



MEMORANDUM

June 25, 2012

To: House Committee on Ways & Means
Attention: Lisa deSoto

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Subject: **Administrative Judges: Overview and Selected Examples**

We are forwarding this memorandum in response to a request for information about administrative judges, how they may differ from Administrative Law Judges, and examples of administrative judges in selected agencies.

I. Introduction

In 1946, Congress enacted the Administrative Procedure Act (APA), establishing the procedures that administrative agencies must follow when exercising their delegated powers.¹ The APA breaks down the powers of administrative agencies into two categories, rulemaking and adjudication. This memorandum focuses on a narrow aspect of the administrative agencies' adjudication powers: the role of administrative judges (AJ).

This memorandum first provides background information on administrative judges. The introduction will briefly discuss adjudications under the Administrative Procedure Act, explain when certain formal hearing procedures are required, and describe the kind of hearings an administrative judge is permitted to preside over and which hearings must be heard by an Administrative Law Judge (ALJ). The memorandum will provide a brief section on ALJs, in order to compare them to AJs. The introduction will then explain what an administrative judge is, define the various roles of administrative judges, and explain the general process for hiring and supervising administrative judges.

¹ Note that the APA generally applies to all agencies. However, if an agency's organic statute specifically departs from APA practices, the organic statute controls.

Following the introduction, the memorandum will then provide examples from selected administrative agencies and describe the role of AJs in those agencies. The five selected agencies are the Board of Veterans Appeals (BVA), the Civilian Board of Contract Appeals (CBCA), the Equal Employment Opportunity Commission (EEOC), the Merit System Protection Board (MSPB), and the Nuclear Regulatory Commission (NRC). For each of these agencies the memorandum will address the number of administrative judges within the agency, provide information on their pay and evaluation, explain the legal authority for their positions, and describe their jurisdiction and hearing procedures. This section will illustrate how the role of AJs varies from agency to agency.

Finally, the memorandum concludes with a selection of literature for further information on the subject.

A. Adjudication

Under the APA, an adjudication is defined as “agency process for the formulation of an order.”² An “order” is defined as “a final disposition ... of an agency in a matter other than rule making but including licensing.”³ Therefore, whenever an agency reaches a determination on a particular issue, other than through the creation of a rule, it is performing an adjudication. Agencies adjudicate a wide range of subjects that can generally be broken down into four categories: (1) enforcement cases; (2) entitlement cases (e.g., benefits claims); (3) regulatory cases (e.g., licensing or ratemaking); and (4) certain cases involving federal procurement contracts.⁴ Although the term adjudication is not necessarily limited to a decision reached in a trial-type hearing,⁵ this memorandum will focus on adjudications that occur in these trial-type settings. Both ALJs and AJs may preside over adjudication procedures. However, in some instances an agency’s enacting statute may require an ALJ, and not an AJ, to preside over a hearing.

Sections 554, 556, and 557 of the APA establish requirements for formal adjudications that are heard within an agency.⁶ These formal hearings must be heard by an Administrative Law Judge or the head of an agency.⁷ AJs cannot preside over these formal agency adjudications and, therefore, necessarily preside over “informal” hearings.⁸ However, under the APA, formal hearing procedures only need to be followed when the agency’s enacting statute calls for an administrative hearing to be held “on the record.”⁹ Many statutes do not contain this triggering language and, therefore, numerous agency adjudications are not required to follow these formal APA hearing procedures. In these situations, administrative judges (AJs) are able to preside over the hearing and make a determination on the case heard before the agency.

² 5 U.S.C. § 551(7).

³ 5 U.S.C. § 551(6).

⁴ PAUL R. VERKUIL ET AL., ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS, VOLUME II, at 784 (1992) (hereinafter ACUS 1992).

⁵ For example, if an employee from the Department of Veterans Affairs (VA) reviews an application for benefits and grants the benefits sought, the employee has performed an adjudication—the agency has created an order to provide benefits to the claimant.

⁶ 5 U.S.C. §§ 554, 556–57.

⁷ *Id.* However, “[a]gency heads seldom have the time to preside as trial tribunals.” Harold Levinson, *The Status of the Administrative Judge*, 38 Am. J. of Comp. Law 523, 526 (1990).

⁸ “Informal” hearings may occur in a similar fashion to formal hearings under the APA. The term informal hearing only indicates that the hearing is not subject to the APA requirements in 5 U.S.C. §§ 554, 556–57. However, informal hearings do have to abide by some provisions of the APA, 5 U.S.C. §§ 555, 558. These sections require that an agency permit parties to be represented by counsel, if they are compelled to appear before the agency, require decisions to be reached in a reasonable time, require an agency to provide transcripts of any testimony, and require an agency to give prompt notice when denying an application. *Id.*

⁹ 5 U.S.C. § 554.

According to a count from 1992, the number of AJs in the administrative judiciary nearly doubled the number of ALJs.¹⁰ This illustrates that many administrative cases are held according to “informal” hearing procedures in front of AJs.

B. What is an Administrative Law Judge?

Although this memorandum focuses on the role of AJs in administrative law, it may also be helpful to understand how they differ from ALJs. When the APA was enacted in 1946, Congress created the position of the ALJ within the federal government. The reason for creating this unique position was to ensure that the presiding officer at formal administrative hearings was free from agency influence or coercion. In order to ensure that these ALJs are able to render independent decisions, the APA provides for their protection in numerous ways.

First, ALJs are selected through a centralized process run by the Office of Personnel Management (OPM).¹¹ There are certain qualifications that applicants must meet in order to be considered for a position of ALJ. ALJs must be “authorized to practice law under the laws of a State, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court.”¹² Furthermore, applicants for ALJ positions must have at least seven years of “experience as a licensed attorney preparing for, participating in, and/or reviewing formal hearings or trials involving litigation and/or administrative law at the Federal, State, or local level.”¹³ Applicants, assuming they pass the OPM examination, are then assigned a score and placed on the register of eligible hires. Agencies in need of an ALJ are then permitted to select an ALJ from the top three available candidates. This hiring process keeps the ALJs from being too connected with their employing agencies.

Following the selective hiring process, ALJs are provided with job security in order to promote independent decision making. ALJs are hired as career positions, and there is no set term for their appointments. Furthermore, they can only be removed for good cause¹⁴ or through a reduction in force.¹⁵ A Senate committee report states that “individuals appointed as [ALJs] hold a position with tenure very similar to that provided for Federal judges under the Constitution.”¹⁶ ALJ salaries are also protected and cannot be reduced unless good cause is shown.¹⁷

The APA also requires that ALJs remain insulated from agency influence during their tenure. The APA expressly states that an ALJ may not “be responsible to or subject to the supervision or direction of an

¹⁰ ACUS 1992, *supra* note 4, at 788. This ACUS report similarly limits the concept of administrative judges to those agency employees that actually preside over a hearing of some kind. *Id.* at 785.

¹¹ 5 U.S.C. § 1302; 5 C.F.R. §§ 930.201–930.211.

¹² OPM, Qualification Standard for Administrative Law Judge Positions, <http://www.opm.gov/qualifications/alj/alj.asp>.

¹³ *Id.*

¹⁴ In order to remove an ALJ for good cause, there must be “good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing.” 5 U.S.C. § 7521.

¹⁵ Reductions in force occur “when there is a surplus of employees at a particular location in a particular line of work.” 5 C.F.R. § 351.201(a)(1). ALJs that are cut due to a reduction in force may receive priority on OPM’s referral list as well as the agency’s own reemployment priority list. 5 C.F.R. § 930.210.

¹⁶ S. REP. NO. 95-697, at 2 (1978).

¹⁷ 5 C.F.R. § 930.211; However, according to an OPM rule, agencies may reduce the pay of an ALJ if the ALJ “submits to the employing agency a written request for a voluntary reduction due to personal reasons” and OPM approves. 5 C.F.R. § 930.205(j).

employee or agent engaged in the performance of investigative or prosecuting functions for an agency.”¹⁸ OPM regulations further establish that agencies have “[t]he responsibility to ensure the independence of the administrative law judge.”¹⁹ Additionally, employing agencies may not conduct performance evaluations in order to modify the behavior or decisions of ALJs, and OPM regulations state that an “agency may not rate the performance of an administrative law judge.”²⁰

Finally, the APA grants certain powers that ALJs may exercise while presiding over administrative hearings. ALJs may issue subpoenas, take depositions, receive evidence, and administer oaths.²¹ Unlike AJs, as discussed below, these powers are granted to ALJs by the APA and not by the employing agency. As such, agencies are not permitted to withhold any of these powers from an ALJ,²² whereas the powers of AJs are dependent on the types of hearings and procedures the employing agencies establish. As such, procedures for ALJ hearings are more uniform while adjudication procedures for AJ hearings vary from agency to agency.

All of these statutory mechanisms were designed to ensure that ALJs are free from undue agency influence or coercion during the adjudication process.

C. What is an Administrative Judge?

Administrative judges are perhaps best defined by their negative. An administrative judge (AJ) is an agency employee who makes an adjudicatory decision and is not an ALJ. Therefore, although an ALJ is a specific position,²³ the term administrative judge is not specific, but rather describes a whole class of adjudicators across numerous administrative agencies. Hearing examiners, hearing officers, administrative judges, immigration judges, veterans law judges, and numerous other agency officials with varying titles are considered to be AJs. That is, they make adjudicatory decisions within an agency, but they are not ALJs. For the purposes of this memorandum, the concept of an AJ will be limited to an agency official who presides over a hearing within the agency.²⁴

Because AJs are not confined to a specifically defined position, there is no cross-agency uniformity in AJ hiring practices, salaries, or jurisdiction. Instead, all of these elements may be unique to each agency within the federal government that employs AJs. Furthermore, because AJs are presiding over “informal adjudications,” the types of hearings they preside over vary from agency to agency as well.

First, AJs differ from ALJs in the selection process. Unlike ALJs, AJs are not hired through the OPM; instead, the employing agency is in charge of the hiring process.²⁵ Furthermore, AJs are not necessarily

¹⁸ 5 U.S.C. § 554(d).

¹⁹ 5 C.F.R. § 930.201(f)(3).

²⁰ 5 C.F.R. § 930.206(a).

²¹ 5 U.S.C. § 556(c).

²² These are subject to an agency having the statutory authority to exercise these powers generally. *Id.*

²³ OPM regulations state that “The title ‘administrative law judge’ is the official title for an administrative law judge position. Each agency must use only this title for personnel, budget, and fiscal purposes.” 5 C.F.R. § 930.201(c).

²⁴ Thus, the report excludes agency employees who often are the principal point of contact with those who are seeking a benefit. For example, a veteran may apply to receive disability compensation from the Department of Veterans Affairs (VA) by sending an application to a VA Regional Office (RO). An agency employee at the RO will make an initial determination on the claim. However, if dissatisfied with that determination, the veteran may appeal the decision and receive a hearing in front of a member of the Board of Veterans’ Appeals. This report excludes the initial decision maker and focuses on the administrative judges that preside over some form of hearing.

²⁵ Various agencies’ qualification requirements for AJs, are provided below, outlining what these agencies seek when making (continued...)

required to be attorneys or experienced in legal practice. The requirements for the various positions are determined by the hiring agency.²⁶ In fact, in some agencies, AJs do not necessarily come from a legal background. In the Nuclear Regulatory Commission (NRC), some of the AJs are required to be physicists or engineers, though at least one member of the presiding panel must be qualified in the conduct of administrative proceedings.²⁷ Other agencies do employ experienced attorneys as their AJs. Members of the Board of Veterans' Appeals, for example, are attorneys with experience in the field of veterans affairs law. Still other administrative agencies require their AJs to meet similar qualifications as ALJs. Immigration Judges from the Executive Office for Immigration Review, which are not ALJs, are required to have an LL.B or a JD degree, must be licensed to practice law as an attorney, and must have seven years of legal experience after passing the bar.²⁸

Second, an AJ is not necessarily guaranteed the same job security as an ALJ. Because they are hired through their employing agencies, the terms and conditions of their employment are controlled by the hiring agencies. Thus, they may have less statutorily required insulation from agency influence. For example, in the NRC, AJs do not necessarily enjoy a career appointment; instead, they may be appointed to five-year terms with the possibility of renewal. However, other agencies, such as the Civilian Board of Contract Appeals, provide their AJs with the same protections as ALJs.²⁹ Furthermore, an agency may promulgate regulations that provide for some degree of independence from agency policy-making officials, and Congress can separate the adjudicative functions of an agency from the policy branches of the agency through statute.³⁰

Third, although an OPM regulation states that agencies “may not rate the performance of” an ALJ, agencies may rate the performance of their AJs. AJ's performance may be evaluated objectively (e.g., timeliness) and subjectively (e.g., quality). The MSPB, for example, provides both objective and subjective review of their AJs work.

The adjudicatory processes that AJs oversee vary from agency to agency as well. As mentioned above, AJ's can only preside over informal administrative hearings. Informal agency hearings are conducted by varying methods, “some resembling what is traditionally thought of as adjudication and others not resembling adjudication at all.”³¹ For example, during NRC adjudications a panel of three adjudicators will accept written testimonies, hear witness testimony, provide for cross-examination by counsel, and then render written opinions.³² This resembles the traditional concepts of a trial-type hearing. However, when the Board of Veterans' Appeals (BVA) hears an appeal from a veteran, the process is far less formal and not as similar to a trial.³³ A hearing with the BVA is essentially a conference with the BVA member

(...continued)

hiring decisions.

²⁶ *Id.*

²⁷ See *infra*, section on NRC AJ qualifications.

²⁸ See Immigration Judge Job Announcement from the Department of Justice, Executive Office for Immigration Review, Job Announcement Number: EOIR-12-0018, available at <http://www.usajobs.gov/GetJob/ViewDetails/313261500#>.

²⁹ Various agencies' tenure provisions for AJs are provided below.

³⁰ See John H. Frye, III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 Admin. L. Rev. 261, 342–43 (1992).

³¹ Michael Asimow, *A Guide to Federal Agency Adjudication* 146 (2003). Informal agency hearings, though not governed by they APA's formal hearing procedures from 5 U.S.C. §§ 554, 556–557, must meet certain minimal requirements as set out in the APA, 5 U.S.C. §§ 555, 558.

³² See *infra*.

³³ See BVA, *HOW DO I APPEAL?* 7–10, available at <http://www.bva.va.gov/docs/Pamphlets/010202A.pdf>.

and the claimant (and the claimant's representative) in attendance. The BVA member listens to the evidence presented by the claimant and even receives new evidence that has not been previously included in the record. So, although some AJs are performing more trial-type adversarial hearings, not all administrative hearings are conducted in this manner. Similarly, rules of evidence, rules on witnesses, and various other procedural rules vary from agency to agency.³⁴

AJs also provide decisions at varying stages of the administrative adjudication process. For example, at the NRC, AJs preside over hearings that are subject to review by the Commission. Meanwhile, AJs from the Board of Veterans' Appeals have the final say during the appeals process within the agency, subject to review by the U.S. Court of Appeals for Veterans Claims. In some agencies, AJs will have the power to review decisions issued by ALJs. In the Social Security Administration (SSA), for example, a claimant may seek review of an SSA determination by an ALJ. If the claimant is dissatisfied with the ALJ's decision, the claimant may appeal to the SSA Appeals Council. The Appeals Council is staffed by 70 Administrative Appeals Judges, not ALJs.

AJs, therefore, vary greatly from agency to agency. Hiring practices, levels of independence, hearing procedures, and the types of decisions that AJs make are different throughout the federal government.

D. ALJs versus AJs

Congress has granted both ALJs and AJs authority to preside over agency adjudications. The Administrative Conference of the United States (ACUS) noted that:

it is quite clear that similar types of determinations made in different agencies are being made by different types of decision makers. For example, disability benefits adjudications at the Social Security Administration are handled by ALJs, at the Department of Veterans Affairs, AJs adjudicate similar types of cases.³⁵

Congress, however, seemingly did not intend for ALJs to preside over all agency adjudications. When Congress enacted the APA, Congress "intended to leave the decision to employ ALJs to agency-specific legislation by stating that ALJs would only be required where statutes called for 'on the record' hearings."³⁶ Since that time, Congress has not acted to require the use of ALJs in all administrative hearings.

Although ALJs enjoy the protections provided by the APA, AJs greatly outnumber ALJs in the administrative judiciary, and AJs continue to "preside over relatively formal proceedings and perform functions virtually indistinguishable from those performed by ALJs."³⁷ Many proponents of using ALJs suggest that the institutional independence of ALJs makes an ALJ better qualified to preside at administrative hearings. However, others point to the fact that AJs have successfully presided over administrative hearings throughout the years. Furthermore, agencies can and often do provide their AJs with protections similar to those granted to ALJs.³⁸

³⁴ See Assimow, *supra* note 30, at 147–48.

³⁵ ACUS, Recommendation 92-7, The Federal Administrative Judiciary 3 (1992), available at <http://www.acus.gov/wp-content/uploads/2011/10/92-7.pdf>.

³⁶ ACUS 1992, *supra* note 4, at 790.

³⁷ Charles H. Koch, Jr., Administrative Law and Practice § 5.24 (3d ed. 2010).

³⁸ See *infra*.

The following section provides examples of how AJs are used in a select set of administrative agencies.

II. Selected Examples

A. Board of Veterans' Appeals³⁹

1. Legal Authorization

The authority and functions of the Board of Veterans' Appeals (BVA) are codified in statute at Chapter 71 of Title 38, United States Code (U.S.C.),⁴⁰ and in regulations found in 38 Code of Federal Regulations (C.F.R.) Part 19.⁴¹

2. Jurisdiction⁴²

The BVA is a component of the Department of Veterans Affairs (VA) with the authority for making final decisions on behalf of the Secretary of Veterans Affairs (VA Secretary) for claims for veterans benefits that are presented for appellate review. The BVA issues final decisions on all appeals for entitlement to veterans benefits, including claims pertaining to: service connection; increased disability ratings; total disability ratings; pensions; insurance benefits; educational benefits; home loan guaranties; vocational rehabilitation; and waivers of indebtedness, fee basis medical care, dependency and indemnity compensation, among other benefits and services.⁴³

3. Number and Distribution⁴⁴

The BVA is lead by a Chairman, appointed by the President and confirmed by the Senate, and a Vice-Chairman, designated by the VA Secretary. Additionally, the BVA consists of a Principal Deputy Vice Chairman, 64 Veterans Law Judges (VLJ),⁴⁵ twelve Senior Counsel, more than 300 staff counsel, and other administrative and clerical staff. The Chairman reports directly to the VA Secretary.

The BVA is comprised of four Decision Teams with jurisdiction over appeals arising from the VA Regional Offices (RO), Medical Centers, and the National Cemetery Administration, in one of four geographical regions: Northeast, Southeast (including Puerto Rico), Midwest, and West (including the Philippines). Each Decision Team includes a Deputy Vice Chairman, two Chief VLJs, 13 line VLJs, two Senior Counsel, and approximately 75 staff counsel. The Deputy Vice Chairmen are members of the BVA who are appointed to that office by the VA Secretary upon the recommendation of the Chairman. Staff counsel review the record on appeal, research the applicable law, and prepare comprehensive draft

³⁹ For the purposes of this memorandum, the AJs employed by the BVA will be referred to as Veterans Law Judges (VLJs), as they are known within the agency.

⁴⁰ 38 U.S.C. §§ 7101-7112.

⁴¹ 38 C.F.R. §§ 19.1-19.102.

⁴² 38 U.S.C. §7104 and 38 C.F.R. § 20.101.

⁴³ Department of Veterans Affairs, *Congressional Submission, FY 2013, Benefits and Burial Programs and Departmental Administration*, Volume 3 of 4, Washington, DC, February 2012, pp. 5C-1.

⁴⁴ This section was drawn from Department of Veterans Affairs, *Annual Report of the Board of Veterans for FY2011*, Washington, DC, February 1, 2012, p. 3.

⁴⁵ According to the VA, BVA currently has 59 VLJs on board with 5 nominations pending with the President for a total of 64.

decisions or remand orders for review by a VLJ who reviews the draft and issues the final decision or appropriate preliminary order in the appeal.

The BVA also has an Appellate Group, which consists of the Principal Deputy Vice Chairman, the Chief Counsel for Policy and Procedure, the Chief Counsel for Operations, the Chiefs of Litigation Support, the Quality Review Team, the Training Office, a Medical Advisor, a Counsel for Labor Relations, several Special Counsel covering a variety of legal specialty areas, and numerous legal support personnel. The Office of Management, Planning, and Analysis is the administrative directorate of the Board, consisting of the Director, the Deputy Director, the Administrative Support Division, the Decision Team Support Division, and the Financial Management Division.

4. Qualifications

Requirements for VLJs include: knowledge of veterans' law and of specialized areas of medicine and law; ability to conduct hearings; ability to manage attorneys; ability to participate in training activities. A candidate also must be a member in good standing of the bar of a state.⁴⁶ Generally, two or more years at the GS-14 or GS-15 level of experience is needed.⁴⁷

5. Tenure

The BVA Chairman is appointed by the President with advice and consent of the Senate. The Chairman serves for six years and may serve for more than one term. The Chairman may be removed by the President alone for "misconduct, inefficiency, neglect of duty, or engaging in the practice of law or for physical or mental disability which, in the opinion of the President, prevents the proper execution of the Chairman's duties. The Chairman may not be removed from office by the President on any other grounds."⁴⁸ The VA Secretary appoints the other BVA members based on recommendations of the Chairman subject to approval of the President.⁴⁹ VLJs are not career appointed positions and must be recertified pursuant to evaluations.⁵⁰

6. Pay and Promotion

Board Members are compensated at rates equivalent to the rates payable to ALJs.⁵¹ The Deputy Vice Chairman positions of the BVA are appointed at the AL-2 level. All other VLJs are placed into the AL-3 pay scale. For that pay scale, the waiting period between AL-3A and AL-3B is 52 weeks; between AL-3B

⁴⁶ 38 U.S.C. 7101A(a)(2).

⁴⁷ Department of Veterans Affairs, "Appeals Regulations: Title for Members of the Board of Veterans' Appeals," 68 *Federal Register* 6622, February 10, 2003.

⁴⁸ 38 U.S.C. § 7101(b)(2).

⁴⁹ 38 U.S.C. § 7101A(a) (1).

⁵⁰ See "Supervision and Evaluation" *infra* for more information on recertification.

⁵¹ 38 U.S.C. 7101A(b). The ALJ pay system has three levels of basic pay: AL-1, AL-2, and AL-3. Pay level AL-3 is the basic pay level for ALJ positions filled through competitive examination. Pay level AL-3 has six rates of basic pay: A, B, C, D, E, and F. Pay levels AL-2 and AL-1 are established by agencies subject to U.S. Office of Personnel Management (OPM) approval. ALJ positions are placed at levels AL-2 and AL-1 when they involve significant administrative and managerial responsibilities. See <http://www.opm.gov/oca/pay/html/ALJ-PaySystem.asp> for details on the ALJ pay system.

and AL-3C is 52 weeks; between AL-3C and AL-3D is 52 weeks; between AL-3D and AL-3E is 104 weeks; and, between AL-3E and AL-3F is 104 weeks. Currently, the Board has two AL-2 (Deputy Vice Chairman (DVC)); one AL-3C; eight AL-3D; eight AL-3E; and forty AL-3F.

There is no “promotion policy” per se for VLJs. If they are performing at a fully successful level, they progress between the various AL steps (AL-3A through AL-3F) depending upon their initial pay levels at their appointments. To be promoted to the AL-2 would require that they compete for the Deputy Vice Chairman position.

7. *Adjudication Procedures*

In general, a veteran wishing to receive a benefit begins the process by submitting an application with one of the VA’s 57 regional offices (RO). If the veteran is satisfied with the benefits decision, the process ends. However, there may be a number of reasons why the veteran may be dissatisfied with the RO’s decision. When the veteran is dissatisfied with the RO’s decision, the veteran has the option to pursue an appeal within the VA by filing a “Notice of Disagreement” (NOD) with the RO. The NOD triggers the RO’s obligation to prepare a “Statement of the Case” (SOC) that tells the veterans how and why it came to the decision that it did. If the veteran wishes to pursue an appeal after receiving the SOC, the veteran must file a specific form (VA Form 9) with the RO indicating the desire that the appeal be considered by the BVA. Current law provides that veterans are entitled to one appeal to the BVA when denied benefits.

The BVA bases its decision “on the entire record of the proceeding and upon consideration of all evidence and material of record and applicable law and regulation.”⁵² In addition to the material developed at the RO, the BVA may also conduct personal hearings with the veteran at which new evidence may be added to the record. An appellant may request that a hearing before the BVA be held at its principal location or at a facility of the VA located within the area served by a RO of the VA. A final BVA decision generally concludes the administrative process.

8. *Internal Review and Appeals*

The BVA allows the claimant or the BVA itself to seek reconsideration of a final decision. There are possible situations where the final decision could be reconsidered: 1) revision on the grounds of clear and unmistakable error;⁵³ 2) discovery of new and material evidence;⁵⁴ and 3) false or fraudulent evidence presented in the initial appeal.⁵⁵ The BVA is to decide all such requests on the merits, without referral to any adjudicative or hearing official acting on behalf of the VA Secretary.

If a veteran is dissatisfied with a final BVA decision, the veteran may appeal that decision to the U.S. Court of Appeals for Veterans Claims (CAVC), which has exclusive jurisdiction to review such matters. The VA Secretary or any other VA official may not appeal an adverse BVA decision.

⁵² 38 U.S.C. § 7104(a).

⁵³ 38 C.F.R. § 20.1000. *I.e.*, error of law or fact.

⁵⁴ *Id.*

⁵⁵ *Id.*

9. *Supervision and Evaluation*

The Chairman of the BVA is required to appoint a performance review panel. The panel is comprised of the Chairman and two other members of the BVA (other than the Vice Chairman). The Chairman periodically rotates membership on the panel so as to ensure that each member of the BVA (other than the Vice Chairman) serves on a panel for and within a reasonable period.⁵⁶ The performance review panel determines, with respect to each member of the BVA (other than the Chairman or a member who is a member of the Senior Executive Service) – including VLJs – whether that person's job performance meets the performance standards established by the BVA. If the determination of the performance review panel is that the person's job performance meets the performance standards, the Chairman shall recertify the person's appointment as a member of the BVA. However, if the performance review panel determines that the person's job performance does not meet the performance standards, the Chairman shall, based upon the individual circumstances, either grant the individual a conditional recertification or recommend to the VA Secretary that the member be noncertified.⁵⁷

⁵⁶ 38 U.S.C. § 7101A (c)(1)(A).

⁵⁷ 38 U.S.C. § 7101A (c)(B)(2)-(3).

B. Civilian Board of Contract Appeals⁵⁸

1. Legal Authorization

The Civilian Board of Contract Appeals (CBCA) was established within the General Services Administration (GSA) in 2006 to hear appeals from the decisions of contracting officers of civilian agencies.⁵⁹ Prior to the creation of the CBCA, these agencies generally had their own boards of contract appeals, established pursuant to the Contract Disputes Act (CDA) of 1978.⁶⁰ However, even before the enactment of the CDA, some agencies had established boards to hear certain appeals relative to their contracts under other authority,⁶¹ or had required contractors to consent to a board's jurisdiction over such appeals as a term of their contracts.⁶²

Federal procurement contracts currently include terms indicting that the contract is subject to the CDA and that, except as provided in that act, all "disputes arising under or relating to th[e] contract shall be resolved under this clause."⁶³ These terms further require that "claims" by contractors shall be made in writing and, unless otherwise provided for in the contract, shall be submitted within six years of accrual to the contracting officer for a written decision.⁶⁴ Contractor claims in excess of \$100,000 must be certified.⁶⁵ Claims by the government against a contractor are also to be submitted to the contracting officer.⁶⁶ Once any claims are submitted, the contracting officer is required, if requested to do so in writing by the contractor, to render a decision on claims of \$100,000 or less within 60 days of the request.⁶⁷ For certified claims in excess of \$100,000, this decision must be rendered within 60 days, or the contracting officer must notify the contractor of the date by which the decision will be made.⁶⁸ Claims that are not decided within the prescribed time frames are deemed to have been denied.⁶⁹ Once the

⁵⁸ For the purposes of this memorandum, all of the members of the Civilian Board of Contract Appeals are considered AJs.

⁵⁹ National Defense Authorization Act for FY2006, P.L. 109-163, div. A, tit. VIII, § 847(d)(3), 119 Stat. 3394 (Jan. 6, 2006) (codified, as amended, at 41 U.S.C. § 7105(b)(1) & (e)(1)(B)). There are separate boards of contract appeals for the Department of Defense and military departments; Tennessee Valley Authority; and Postal Service. *See* 41 U.S.C. § 7105(a), (c), & (d).

⁶⁰ P.L. 95-563, 92 Stat. 2383 (Nov. 1, 1978). The CDA authorized the establishment of such boards if the "volume of contract claims justify[ed] the establishment of a full-time agency board of at least three members." *Id.*, at § 8(a)(1), 92 Stat. 2385. Agencies that did not have a sufficient volume of claims, or that opted not to establish a board for other reasons, could arrange for appeals from their contracting officers to be heard by other agencies' boards. *Id.*, at § 8(c), 92 Stat. 2386. The proliferation of such boards under the CDA prompted calls for consolidation, which ultimately resulted in the creation of the CBCA. *See, e.g.,* Jeri Kaylene Somers, *The Board of Contract Appeals: A Historical Perspective*, 60 AM. U. L. REV. 745, 755 (2011).

⁶¹ *See, e.g.,* *United States v. Adams*, 74 U.S. (7 Wall.) 463, 477 (1868) (finding that the Secretary of War's statutory authority to administer the War Department permitted him to appoint a board to hear and decide certain claims relative to payment under agency contracts).

⁶² *See, e.g., Board of Contract Appeals*, *supra* note 60, at 749-50 (standard clauses used in War Department contracts).

⁶³ 48 C.F.R. § 33.215 (governing use of the standard contract clause); 48 C.F.R. § 52.233-1 (standard "Disputes" Clause).

⁶⁴ 48 C.F.R. § 52.233-1(d)(1). A "claim" is any "written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to th[e] contract." 48 C.F.R. § 52.233-1(c).

⁶⁵ 48 C.F.R. § 52.233-1(d)(2)(i). The standard contract clause prescribes the terms of this certification, as well as specifies who may certify a claim on behalf of a contractor.

⁶⁶ 48 C.F.R. § 52.233-1(d)(1).

⁶⁷ 48 C.F.R. § 52.233-1(e).

⁶⁸ *Id.*

⁶⁹ 41 U.S.C. § 7103(f)(5). *See also* *Pathman Constr. Co., Inc. v. United States*, 817 F.2d 1573 (Fed. Cir. 1987).

contracting officer makes a decision, that decision is final unless the contractor appeals to a board of contract appeals within 90 days, or files suit, as discussed below, within 12 months.⁷⁰

2. Jurisdiction

The CBCA generally has jurisdiction over “contract disputes,” or appeals of contracting officers’ final decisions regarding claims submitted by contractors against the government, or by the government against a contractor, relative to an express or implied contract for the procurement of services, construction, or personal property, or for the disposal of personal property.⁷¹ In such cases, it may grant any form of relief that would be available to a litigant asserting a claim in the U.S. Court of Federal Claims, including monetary or other relief arising from or related to a contract.⁷² However, the CBCA’s jurisdiction over contract disputes is non-exclusive, and contractors may opt to bring actions on contract claims directly in the U.S. Court of Federal Claims, instead of with a board of contract appeals.⁷³

The CBCA may also, if the agencies affected concur, exercise jurisdiction over any additional category of laws or disputes over which an agency board of contract appeals exercised jurisdiction prior to the establishment of the CBCA, or any other function a board performed on behalf of an agency prior to the CBCA’s establishment.⁷⁴ At present, this means that the CBCA exercises jurisdiction over: (1) cases arising under the Indian Self-Determination Act; (2) certain disputes between insurance companies and the Department of Agriculture’s Risk Management Agency; (3) claims by federal employees for reimbursement of expenses incurred while on official temporary duty travel or in connection with relocation to a new duty station; (4) certain claims by carriers or freight forwarders regarding payment for services; and (5) requests for arbitration involving public assistance applications arising from damage from Hurricanes Katrina and Rita.⁷⁵

3. Number and Distribution

The CBCA currently has 15 members,⁷⁶ but has reportedly had as many as 18 members in the past.⁷⁷ The Board is located in Washington, D.C., but the Board could potentially order hearings in other places, and parties may submit their case on the record without a hearing.⁷⁸

⁷⁰ 48 C.F.R. § 52.233-1(f).

⁷¹ 41 U.S.C. §§ 7102-7105. Claims by the government against a contractor that are based on fraudulent claims by the contractor are excluded from the Board’s jurisdiction, as are claims in certain other cases. 41 U.S.C. § 7102(c) (contracts with foreign governments or international organizations); 41 U.S.C. § 7102(d) (maritime contracts); 41 U.S.C. § 7103(a)(4)(B) (certain claims involving fraud).

⁷² See, e.g., 41 U.S.C. § 7105(e)(2); *Todd Construction, L.P. v. United States*, 88 Fed. Cl. 235, 243-44 (2009).

⁷³ 41 U.S.C. § 7104(b)(1).

⁷⁴ 41 U.S.C. § 7105(b)(4)(B)(i)-(ii).

⁷⁵ See Civilian Board of Contract Appeals, Cases Heard by the Board, Jan. 4, 2011, *available at* <http://www.cbca.gsa.gov/Filing%20Cases%20at%20the%20Board/Filing%20Cases%20at%20the%20Board.htm>.

⁷⁶ Civilian Board of Contract Appeals, Judges, Jan. 12, 2012, *available at* <http://www.cbca.gsa.gov/judges/judges.htm>.

⁷⁷ Ralph C. Nash, Jr., Steve L. Schooner, Karen R. O’Brien-DeBakey, and Vernon J. Edwards, *THE GOVERNMENT CONTRACTS REFERENCE BOOK: A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT* 66 (3d ed., 2007).

⁷⁸ U.S. Civilian Board of Contract Appeals, Rules of Procedure, Rule 19, Aug. 17, 2011, *available at* <http://www.cbca.gsa.gov/RULES%20OF%20PROCEDURE/index.htm>.

4. Qualifications

Board members are appointed based solely on the “professional qualifications required to perform the duties and responsibilities of a Civilian Board member,” and must have at least five years experience in public contract law.⁷⁹ These are statutory requirements. However, additional qualifications have been imposed in the hiring process, and recently include the requirement that at least two years of the qualifying experience in public contract law must have been “at a level of difficulty and responsibility comparable to the GS-15 grade level or above.”⁸⁰

5. Tenure

CBCA members serve until they are removed for cause, resign, or retire.⁸¹

6. Pay and Promotion

There are three levels (or “pay rates”) of members:

- CA-1 Chairman (1 incumbent)
- CA-2 Vice Chair (1 incumbent)
- CA-3 Board Judge (13 incumbents).

The total pay of each CBCA member (Chairman, Vice Chair, and Board Judges), including locality pay, equals \$165,300 per year (rate limited to the rate for level III of the Executive Schedule). There is no promotion policy for Board Judges.

7. Adjudication Procedures

The CBCA decides appeals of contracting officers’ final decisions pursuant to rules of procedure that it has adopted. These rules address time limits for filing, pleadings and amendment of pleadings, service of papers other than subpoenas, motions, conferences, discovery and exhibits, and hearing procedures, among other things.⁸² For example, any hearings are to be held at the time and place ordered by the Board, and will be scheduled at the discretion of the Board based on its rules, the need for orderly management of the Board’s caseload, and the stated desires of the parties.⁸³ All hearings on the merits “shall be open to the public and conducted insofar as is convenient in regular hearing rooms,” except when necessary to maintain the confidentiality of protected material or testimony, or material submitted *in camera*.⁸⁴ Hearings are generally recorded and transcribed.⁸⁵ Except at the Board’s order, no proof shall be received in evidence after a hearing is completed, or in cases submitted on the record without a

⁷⁹ 41 U.S.C. § 7105(b)(2)(A)-(B).

⁸⁰ See, e.g., Procedures for Selection of Civilian Board of Contract Appeals Members, *available at* <http://www.cbca.gsa.gov> (last accessed: June 21, 2012).

⁸¹ See 41 U.S.C. § 7105(b)(3) (providing that CBCA members may be removed in the same manner as administrative law judges, as provided in 5 U.S.C. § 7521).

⁸² See generally Rules of Procedure, *supra* note 78.

⁸³ Rules of Procedure, *supra* note 78, at Rule 20.

⁸⁴ *Id.*, at Rule 21.

⁸⁵ *Id.*, at Rule 22(a).

hearing, after the Board has notified the parties that the record is closed and the case is ready for decision.⁸⁶ Except in the case of small claims, decisions shall be made in writing upon the record.⁸⁷

Board procedures generally parallel those of the Federal Rules of Civil Procedure and Federal Rules of Evidence, although they do depart from these Rules in certain ways, such as by generally allowing the admissibility of hearsay.⁸⁸ As required by statute, the CBCA provides for the use of accelerated procedures, simplified procedures for small claims, and alternative dispute resolution.⁸⁹ “Small claims” are those where the amount in dispute is \$50,000 or less, or in the case of a small business, \$150,000 or less.⁹⁰

8. Internal Review and Appeals

Decisions are generally made by a panel of three board members.⁹¹ Parties may move for reconsideration, amendment, or new hearings on any or all of the issues addressed in a CBCA decision. However, such relief will generally only be granted on one of the grounds specified in the CBCA rules (e.g., the decision is void),⁹² or for “reasons established by the rules of common law or equity as between private parties in the courts of the United States.”⁹³ Decisions may also be appealed to the U.S. Court of Appeals for the Federal Circuit by either the contractor or the government within 120 days from the date when a copy of the decision is received.⁹⁴

9. Supervision and Evaluation

The CA-3 Board Judges are supervised by the CA-2 Vice Chair, who is supervised by the CA-1 Chairman. The Chairman of the Board reports to the Administrator of General Services.

⁸⁶ *Id.*, at Rule 24(a).

⁸⁷ *Id.*, at Rule 25(a).

⁸⁸ *Id.*, at Rule 10.

⁸⁹ 41 U.S.C. § 7103(h) (alternative dispute resolution); 41 U.S.C. § 7106 (a) & (b) (accelerated and small claims procedures).

⁹⁰ 41 U.S.C. § 7106(b)(1).

⁹¹ Consideration by the full Board may be requested, but such requests are “not favored” and generally will only be granted when “it is necessary to secure or maintain uniformity of Board decisions, or the matter to be referred is one of exceptional importance.” Rules of Procedure, *supra* note 78, at Rule 28. A majority of judges may also initiate full Board consideration at any time while the case is before the Board. *Id.*

⁹² *Id.*, at Rule 27.

⁹³ *Id.*, at Rule 26.

⁹⁴ 41 U.S.C. § 7107(a)(1)(A)-(B). The Attorney General must approve any appeal taken by a contracting agency. *Id.*

C. Equal Employment Opportunity Commission

1. Legal Authorization

The Equal Employment Opportunity Commission (EEOC or Commission) is a federal agency, established by statute,⁹⁵ that is responsible for enforcing a variety of federal laws prohibiting employment discrimination. In addition to investigating complaints regarding employment in the private sector, the EEOC conducts administrative hearings and issues appellate decisions regarding employment discrimination complaints filed by federal employees. These latter duties are handled by EEOC AJs, which are authorized under the various statutory provisions governing procedures for federal employees who file discrimination charges.⁹⁶ In addition, the EEOC has extensive regulations that address AJ responsibilities and procedures.⁹⁷

2. Jurisdiction

In general, EEOC AJs do not have jurisdiction to adjudicate matters involving allegations of discrimination by private employers.⁹⁸ Instead, they conduct hearings and issue decisions regarding the discrimination complaints of federal employees. A federal employee who believes he is a victim of discrimination must first file a complaint with his agency, which then conducts an investigation. At that point, the employee may request a hearing before an EEOC AJ or a final decision from the agency. If an employee requests a final decision from an agency and wishes to contest that decision, the individual may file an appeal with the EEOC. EEOC AJs also have jurisdiction to adjudicate such appeals.⁹⁹

3. Number and Distribution

According to the EEOC,¹⁰⁰ the agency employs 108 AJs at the following District Office (DO), Field Office (FO), Area Office (AO), and Local Office (LO) locations:

- Atlanta DO(5)
- Birmingham DO(4)
- Charlotte DO(3)
- Norfolk LO (1)
- Raleigh AO (2)
- Chicago DO (2)

⁹⁵ 42 U.S.C. § 2000e-4.

⁹⁶ See, e.g., 42 U.S.C. § 2000e-16(b), (c); 29 U.S.C. § 633a(b); 29 U.S.C. § 794a(a).

⁹⁷ See, e.g., 29 C.F.R. §§ 1614.106 et seq.

⁹⁸ The EEOC's role with respect to private employees is to receive and investigate complaints of discrimination and attempt to mediate a resolution, but the EEOC does not adjudicate such complaints. Instead, individuals who are unsatisfied with the agency's attempts at resolving their complaints may file in federal court. 42 U.S.C. § 2000e-5.

⁹⁹ For more information, see Equal Employment Opportunity Commission, *Overview of Federal Sector EEO Complaint Process*, http://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm.

¹⁰⁰ This information was provided to CRS by the EEOC on June 20, 2012.

- Milwaukee AO (3)
- Minneapolis AO (1)
- Dallas DO (5)
- San Antonio FO (3)
- Houston DO (3)
- New Orleans FO (2)
- Detroit FO (2)
- Indianapolis DO (3)
- Los Angeles DO (7)
- Memphis DO (2)
- Miami DO (8)
- San Juan LO (1)
- Boston AO (1)
- New York DO (5)
- Baltimore FO (6)
- Cleveland FO (5)
- Philadelphia DO (3)
- Albuquerque AO (1)
- Denver FO (2)
- Phoenix DO (3)
- San Francisco DO (9)
- Seattle FO (2)
- Oklahoma City AO (1)
- St. Louis DO (3)
- Washington (State) FO (10)

4. Qualifications

According to an AJ position description provided by the EEOC, the qualifications necessary to be an EEOC AJ include the following: (1) admission to the Bar; (2) a demonstrable knowledge of current employment law, as well as EEOC regulations and policies; (3) a comprehensive knowledge of the legal system and processes; (4) knowledge of the organization, policies, regulations, and procedures of the federal government; (5) ability to interpret laws, analyze facts, and issue a decision; (6) ability to deal

with parties under pressure; and (7) possession of a high-level of judicial temperament and skill to preside over hearings.¹⁰¹

More detailed qualification requirements may appear in vacancy announcements that are periodically published on the USAJOBS website.

5. Tenure

EEOC AJs appear to be serving in permanent appointments that enjoy certain civil service protections. They do not appear to be subject to any tenure restrictions.

6. Pay and Promotion

Currently, of the total number of AJs, 5 AJs are paid at the GS-13 level, and 103 AJs are paid at the GS-14 level.¹⁰² EEOC AJ positions have a career ladder to the GS-14 level. Therefore, AJs can be promoted to that level without competition, and the position does not have to be posted.

7. Adjudication Procedures

In general, a federal employee who files a discrimination claim with her federal agency has two choices once the agency has completed its investigation: (1) request a hearing before an EEOC AJ; or (2) request a final decision from the agency.

Under the first option, the EEOC AJ conducts a hearing, issues a decision, and orders relief if discrimination is found. The federal agency must then respond by issuing a final order that accepts or rejects the AJ's decision. If that final order rejects the AJ's decision, then the agency must simultaneously file an appeal with the EEOC AJ. A federal employee may appeal the agency's final order to the EEOC's Office of Federal Operations, at which point EEOC appellate attorneys will review the entire file, including the agency's investigation, the AJ's decision, the hearing transcript, and any appeal statements. Alternatively, the employee may file a lawsuit challenging the agency's order in federal district court.

Under the second option, a federal employee may request a final decision from the agency. If the employee is dissatisfied with the agency's decision, he may appeal it to the EEOC. This appeal is heard by an EEOC AJ. Alternatively, the employee may file a lawsuit challenging the agency's decision in federal district court.

More details about the EEOC's adjudication procedures regarding federal employment discrimination complaints are available on the agency's website.¹⁰³ The Commission has also published detailed guidance regarding adjudication procedures in a handbook for its AJs.¹⁰⁴

¹⁰¹ Equal Employment Opportunity Commission, *Position Description, Administrative Judge*, July 19, 2002 (on file with CRS).

¹⁰² The GS-13 AJs are in Atlanta DO (1), Birmingham DO (2), Memphis DO (1), and New York DO (1). The GS-14 AJs are in all of the DO, FO, AO, and LO offices listed above. The 2012 salary tables for the General Schedule (GS), by locality pay area, are available on the Office of Personnel Management website at <http://www.opm.gov/oca/12tables/indexGS.asp>.

¹⁰³ See http://www.eeoc.gov/federal/fed_employees/index.cfm.

¹⁰⁴ Equal Employment Opportunity Commission, *U.S. Equal Employment Opportunity Commission Handbook for Administrative Judges*, July 1, 2002, <http://www.eeoc.gov/federal/ajhandbook.cfm>.

8. *Internal Review and Appeals*

Appeals procedures are described in the preceding section.

9. *Supervision and Evaluation*

The EEOC's position description for AJs describes supervision of AJs as follows:

The incumbent works under the general supervision of a Supervisory Attorney-Examiner (CR) or Lead Administrative Judge who assigns cases without preliminary instructions. The incumbent is independently responsible for case processing and adjudicatory activities and retains signatory authority for his/her assigned cases. The incumbents decisions are seldom reviewed prior to issuance for conformance with commission policy, precedential effect and overall quality. Decisions delivered orally from the bench following the hearing, if reviewed, are reviewed only after they are rendered. Conclusions of law such as whether or not discrimination is proven by a preponderance of the evidence, is an independent function of the Attorney-Examiner (CR). Work is considered technically authoritative.¹⁰⁵

CRS was unable to find information regarding evaluation of EEOC AJs.

¹⁰⁵ Equal Employment Opportunity Commission, *Position Description, Administrative Judge*, July 19, 2002 (on file with CRS).

D. Merit Systems Protection Board

1. Legal Authorization

The Merit Systems Protection Board (MSPB or Board) is a federal entity – created by statute – that itself hears or adjudicates, or provides for a hearing or adjudication via other adjudicators, all matters within the jurisdiction of the Board under title 5 of the U.S. Code, chapter 43 of title 38 relating to veterans, or any other law, rule, or regulation relating to federal merit systems. Subject to otherwise applicable provisions of law, the MSPB takes final action on any such matter. It can order any federal agency or employee to comply with its order or decision and enforce compliance with any such order. The Board also can conduct, from time to time, special studies relating to the civil service and review rules and regulations of the Office of Personnel Management. Any member of the Board and any employee of the Board designated by the Board, including AJs, may administer oaths, examine witnesses, take depositions, and receive evidence. These individuals also may issue subpoenas requiring attendance and presentation of testimony and production of documentary or other evidence.¹⁰⁶ An employee or applicant for employment may submit an appeal to the MSPB from any action which is appealable to the Board under any law, rule, or regulation.¹⁰⁷

2. Jurisdiction

The Board itself has original jurisdiction including actions brought by the Special Counsel under 5 U.S.C. §§ 1214 (investigation of prohibited personnel practices; corrective action), 1215 (disciplinary action for prohibited personnel practices), and 1216 (other matters within the jurisdiction of the Special Counsel such as enforcing the Hatch Act); requests for informal hearings from persons removed from the Senior Executive Service for performance deficiencies; and actions against ALJs under 5 U.S.C. § 7521.¹⁰⁸

The Board has appellate jurisdiction in various categories: appeals from agency actions including reduction in grade or removal for unacceptable performance or for such cause as will promote the efficiency of the service, i.e., adverse actions; appeals under the Uniformed Services Employment and Reemployment Rights Act (P.L. 103-353) and the Veterans Employment Opportunities Act (P.L. 103-353); and appeals involving an allegation that was the result of whistleblowing (5 C.F.R. § 1201.3). The AJs may hear, adjudicate, and issue initial decisions in appellate jurisdiction cases. The MSPB employs no ALJs.

3. Number and Distribution

The MSPB currently employs 59 AJs in career ladder positions that begin at the GS-13 pay grade and end at the GS-15 pay grade. Currently, the staff includes 3 AJs at the GS-14 level and 56 AJ at the GS-15 level. There are currently no AJs at the GS-13 level.

The AJs by regional office (RO) and field office (FO) location follow: Atlanta RO (8), Chicago RO (8), Dallas RO (6), Denver FO (5), New York FO (5), Philadelphia RO (7), San Francisco RO (10), Alexandria (VA) (RO) (9) and the Washington, DC, Headquarters office (1).

¹⁰⁶ 5 U.S.C. § 1204.

¹⁰⁷ 5 U.S.C. § 7701.

¹⁰⁸ 5 C.F.R. § 1201.2.

4. Qualifications

To qualify as an AJ, the individual must be duly licensed and authorized to practice as an attorney under the laws of a state, Territory, or the District of Columbia and meet the following requirements within 30 days of the closing date.

GS-905-13: The first professional law degree (LL.B. or J.D.) plus one of the following:

- a. Superior law student (i.e, academic standing in the upper 1/3 of an accredited law school graduating class; work or achievement of significance on the law school's official law review or moot court board; special high-level honors for academic excellence in law school-such as, election to Order of the Coif; winning of a moot court team which represent the law school in competition with other law schools, full-time or continuous participation in a legal aid program-as opposed to intermittent or casual participation; significant summer law clerk experience) or other evidence of clearly superior work achievement; plus two years of professional legal experience in employment law applicable to federal employees and agencies, one of which must be at a level of difficulty comparable to the GS-905-12;
- b. Three years of professional legal experience in employment law applicable to federal employees and agencies, one of which must be at level of difficulty comparable to the GS-905-12; or
- c. Second professional law degree (LL.M.) plus two years of professional legal experience in employment law applicable to federal employees and agencies, one of which must be at the level in difficulty comparable to the GS-905-12.

GS-905-14: The first professional law degree (LL.B. or J.D.) plus one of the following:

- a. Superior law student work plus three years of professional legal experience in employment law applicable to federal employees and agencies, one of which must be at a level of difficulty comparable to the GS-905-13;
- b. Four years of professional legal experience in employment law applicable to federal employees and agencies, one of which must be at level of difficulty comparable to the GS-905-13; or
- c. Second professional law degree (LL.M.) plus three years of professional legal experience in employment law applicable to federal employees and agencies, one of which must be at the level in difficulty comparable to the GS-905-13.

GS-905-15: The first professional law degree (LL.B. or J.D.) plus one of the following:

- a. Superior law student work plus four years of professional legal experience in employment law applicable to federal employees and agencies, one of which must be at a level of difficulty comparable to the GS-905-14;
 - b. Five years of professional legal experience in employment law applicable to federal employees and agencies, one of which must be at level of difficulty comparable to the GS-905-14; or
 - c. Second professional law degree (LL.M.) plus four years of professional legal experience in employment law applicable to federal employees and agencies, one of which must be at the level in difficulty comparable to the GS-905-14.
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5. *Tenure*

All AJs within the MSPB serve in permanent appointments and enjoy the protection of 5 U.S.C. § 4303 (actions based on unacceptable performance). Moreover, because they are in the MSPB Professional Association's bargaining unit, they are covered by the grievance and arbitration provisions of the agreement, Articles 14-16, as well as the articles that relate to adverse and disciplinary actions and performance based actions, Articles 21 and 22, respectively.

Section 1201.12 (Appeals by Board employees) of title 5 of the Code of Federal Regulations provides, in relevant part, that, "The Board's policy is to insulate the adjudication of its own employees' appeals from agency involvement as much as possible. Accordingly, the Board will not disturb initial decisions in these cases unless the party shows that there has been harmful procedural irregularity in the proceedings before the administrative law judge or a clear error of law."

6. *Pay and Promotion*

The promotion policy for AJ is governed by the MSPB's Personnel Manual and the Collective Bargaining Agreement Between the MSPB Professional Association and the agency. Under the provisions of the Personnel Manual, an MSPB attorney may receive a "career ladder" promotion to the next higher nonsupervisory grade in the same location and MSPB organization without competition when:

- Nonsupervisory higher grade duties are available in the same location and organization where the attorney works;
- The attorney meets the applicable requirements for the next higher grade and has completed one year of federal attorney service at the present (or higher) grade;
- The attorney has received an MSPB summary rating of "Fully Successful" or better in a performance appraisal which was completed since acquiring the current grade and has demonstrated the ability to adequately perform at the next higher grade level; and
- The immediate supervisor submits a Request for Personnel Action (Standard Form 52) through the approving manager to the Director of Human Resources.

The Collective Bargaining Agreement provides that the time-in-grade requirement for promotion from the GS-13 to the GS-14 level is 18 months. The Agreement specifies that the time-in-grade requirement for promotion from the GS14 level to the GS-15 level is 24 months. However, the Personnel Manual permits an "accelerated career ladder promotion" for an AJ who:

- Is within 6 months of completing one year of federal attorney service at the present (or higher) grade;
- Has received an MSPB summary rating of "outstanding" in a performance appraisal completed since acquiring the current grade; and
- Is recommended for an accelerated career ladder promotion by the immediate supervisor with the concurrence of the Director of Regional Operations.

7. *Adjudication Procedures*

An appellant has a right to a hearing for which a transcript will be kept and to be represented by an attorney or other representative. The Board itself may hear any case appealed to it or refer it to an AJ. In any case involving a removal from the civil service, the case shall be heard by the Board or an employee

experienced in hearing appeals.¹⁰⁹ While an appellant has a right to a hearing under 5 U.S.C. § 7701, if a request for it is not filed in a timely manner, that right is waived.¹¹⁰

AJs have the authority in hearings to administer oaths and affirmations, issue subpoenas, and issue final decisions. They also may initiate attempts to settle appeals informally at any time. If parties agree to settle their dispute, the settlement is the final and binding resolution of the dispute and the AJ dismisses the appeal with prejudice.¹¹¹

In actions involving discrimination, the Board must, within 120 days of filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under 5 U.S.C. § 7702.

Decisions of the Board are subject to the judicial review by the U.S. Court of Appeals for the Federal Circuit, except for those involving discrimination which are subject to judicial review in U.S. district courts.¹¹²

An initial decision of an AJ becomes final 35 days after it is issued. It is not precedential. An initial decision does not become final if any party files a petition for review in a timely manner or if the Board reopens the case on its own motion. It also becomes final if the Board denies all petitions for review.¹¹³

8. Internal Review and Appeals

Any party to a proceeding, the Director of the Office of Personnel Management, or the Special Counsel may file a petition for review of an AJ's initial decision to the MSPB.¹¹⁴ If the Board grants a petition for review or a cross petition for review, or reopens or dismisses a case, the decision of the Board is final if it disposes of the entire action.

9. Supervision and Evaluation

AJs are supervised and evaluated by their Regional Directors, who interact with them on a regular, if not daily basis. Regional Directors review AJs' written products and, from time to time, observe their conferences and hearings. AJs in the Board's two field offices are supervised by the Chief Administrative Judge in the office, who also evaluates them subject to the formal agreement of the Regional Director. All evaluations of AJs are reviewed and concurred on by the Director of Regional Operations before they become final.

The AJs are evaluated in accordance with their work performance standards. These standards are intended to measure all the significant components of their work, both the objective aspects of timeliness and production, and the more subjective aspects of quality. To gauge the quality of their performance, skills such as the management of their cases, the competence with which conferences and hearings are

¹⁰⁹ 5 U.S.C. § 7701.

¹¹⁰ 5 C.F.R. § 1201.24.

¹¹¹ 5 C.F.R. § 1201.41.

¹¹² 5 U.S.C. § 7703.

¹¹³ 5 C.F.R. § 1201.113.

¹¹⁴ 5 C.F.R. § 1201.114.

conducted, the manner in which they interact with the parties in their cases and with their colleagues, and the legal and factual soundness and completeness of their decision are all considered. Each of these aspects of their performance is a critical part of an AJ's job, and several indicia of how well each one is performed are prescribed in the performance standards. These standards do not vary between GS-13, -14, and -15 grade levels because each is a critical component of an AJ's job. Nevertheless, the degree of difficulty and complexity of the cases assigned, as well as the amount of review afforded, vary at the different grade levels and based on the experience of the AJ.

E. Nuclear Regulatory Commission

1. Legal Authorization

The Atomic Energy Act of 1954 (specifically 42 U.S.C. § 2241(a)) authorizes the Nuclear Regulatory Commission (NRC or Commission) “to establish one or more atomic safety and licensing boards, each comprised of three members, one of whom shall be qualified in the conduct of administrative proceedings and two of whom shall have such technical or other qualifications as the Commission deems appropriate to the issues to be decided.”

2. Jurisdiction

The Atomic Safety and Licensing Board Panel (ASLBP) conducts hearings for the Commission and other regulatory functions as the Commission authorizes with respect to the “granting, suspending, revoking, or amending of any license or authorization.”¹¹⁵

3. Number and Distribution

At this time, the NRC employs 16 full-time AJs and 25 part-time Special Government Employee (SGE) AJs.¹¹⁶ The NRC Chairman, subject to the approval of the Commission, initiates the appointment of NRC AJs to the Atomic Safety and Licensing Board Panel. The Panel conducts the hearings through three-person boards. The Commission or Chief Administrative Judge appoints the members of these three-person boards from the Panel. Currently, 41 individuals are Panel members and may serve on these boards.¹¹⁷ The Panel members include individuals who are engineers, scientists or lawyers and may serve as “legal judges” (lawyers) or “technical judges” (scientists or engineers), and some members who may serve as both.¹¹⁸

One member of the board must be qualified in the conduct of administrative proceedings (legal), and at least two members shall have technical or other qualifications as deemed appropriate for the Commission regarding the issues being decided.¹¹⁹

The NRC Chairman, subject to the approval of the Commission, initiates the appointment of the Chief Administrative Judge. The Chief Administrative Judge designates the Associate Chief Administrative Judge (legal) and the Associate Chief Administrative Judge (technical).

¹¹⁵ 42 U.S.C. § 2241(a); 10 C.F.R. § 1.15 (2002).

¹¹⁶ SGE AJs are employees appointed under one-year, temporary – but potentially renewable – intermittent work schedules. For a list of ASLBP members, see <http://www.nrc.gov/about-nrc/organization/panel-members.html>.

¹¹⁷ *Id.*

¹¹⁸ *Id.* Although the NRC has employed ALJs in the past, see U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-93-6, ALLEGATIONS OF INTERFERENCE BY THE DEPARTMENT OF THE INTERIOR (1992), the agency has told CRS that it does not currently utilize ALJs in adjudications. Authority exists, however, that would permit the agency to hire ALJs and allow those judges to preside over certain NRC hearings or adjudications.

¹¹⁹ 42 U.S.C. § 2241(a).

4. *Qualifications*

AJs may be lawyers, physicists, engineers, or environmental scientists. A review committee screens candidates for full-time and part-time positions on the Panel. In order to qualify for membership on the Panel, the candidate must have a background in law, engineering, or science, including at least 7-10 years of work experience in fields related to the Panel. A security clearance is also required.¹²⁰

5. *Tenure*

Full-time AJs are appointed under a career (permanent) or a term appointment (typically five-years). Part-time AJs are appointed under one-year, temporary appointments – which are renewable indefinitely – with intermittent work schedules.¹²¹

6. *Pay and Promotion*

The Commission approves the pay system for full-time NRC AJs and establishes the pay of SGE AJs. The 16 full-time AJs are all currently paid at a rate of \$165,300 per year. The 25 SGE AJs are all currently paid at a rate equivalent to EX-IV (\$74.51 per hour).¹²²

Board members may be appointed by the Commission from the private sector or from Commission staff or another federal agency. Board members appointed from the private sector receive per diem compensation for each day spent in meetings or conferences. All members of a board, regardless of appointment, receive traveling and other expenses accrued while engaged in the work of a board.¹²³

The NRC does not have different grade levels for full-time or SGE AJs. An SGE AJ can be appointed as a full-time AJ if she is competitively selected for a full-time AJ position, or if the vacancy announcement from which the SGE employee was selected indicated the possibility of conversion to a full-time position without further competition.

7. *Adjudication Procedures*

The NRC's regulations outline the different types of hearing procedures, informal and formal.¹²⁴ The Commission's formal hearing procedures conform to the APA. Proceedings of the boards involve typical, civil trial practices such as pleadings, motions, and mandatory document disclosure. The hearings rely extensively upon pre-filed written testimony as often found in administrative proceedings. Evidentiary proceedings entail public hearings with sworn witnesses questioned by the board members and sometimes cross-examined by counsel. The board then produces written decisions.¹²⁵

¹²⁰ Nuclear Regulatory Commission, DT-93-07, Administrative Judges – Compensation and Staffing, Directive 10.153 (March 2, 1993).

¹²¹ *Id.*

¹²² *Id.*

¹²³ 42 U.S.C. § 2241(b).

¹²⁴ 10 C.F.R. § 2.1200 (2011) (informal); 10 C.F.R. § 2.700 (2006) (formal).

¹²⁵ See 10 C.F.R., part 2, subpart C; *ASLBP Responsibilities*, available at, website <http://www.nrc.gov/about-nrc/regulatory/adjudicatory/aslbp-respons.html>.

The Chief Administrative Judge develops and applies procedures governing the activities of the boards, AJs, and ALJs and makes appropriate recommendations to the Commission concerning the rules governing hearing procedures. The Commission then determines the appropriate procedures for hearings, whether informal or formal.¹²⁶

8. Internal Review and Appeals

The Commission shall hold a hearing upon request of any person whose interest may be affected by a board proceeding. The hearing shall occur 30 days after publication of notice in the *Federal Register*.¹²⁷ All decisions are reviewable by the Commission. Final decisions by the Commission are subject to judicial review available under chapter 158 of title 28.¹²⁸

9. Supervision and Evaluation

The Chief Administrative Judge, who reports to the Commission, supervises the Panel and its members.¹²⁹ AJs are excluded from the NRC's performance appraisal system for Senior Level System (SLS) employees.¹³⁰

10. Miscellaneous

Members of the Panel are subject to the conflict of interest laws and regulations regarding ethical standards for federal judges. An AJ cannot participate in any proceeding that could affect the interests of any party funding the judge's activities.¹³¹

¹²⁶ 42 U.S.C. § 2239(a)(1)(B)(iv).

¹²⁷ 42 U.S.C. § 2239(a)(1)(A).

¹²⁸ 42 U.S.C. § 2239.

¹²⁹ NRC Manual 0106-01.

¹³⁰ Senior Level Performance Appraisal System Directive 10.148-01.

¹³¹ See 10 C.F.R. § 7.20 (2002).

III. Appendix: Administrative Judges -- A Selected Review of the Literature

The following is a selected bibliography of recent articles and surveys on administrative judges (“AJs”). Materials have been selected from various CRS databases and the Library of Congress online catalog.

James E. Moliterno, *The Administrative Judiciary’s Independence Myth*, 41 Wake Forest L. Rev. 1191 (2006).

Review of ALJ and administrative judges in various agencies and issues surrounding their independence. Also addresses ethics and whether administrative judges are “judges”.

Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 Ala. L. Rev. 693 (2005).

Article on administrative adjudications as part of the policymaking process. Covers various types of administrative judges and their role in applying policy and influencing the development of future policies.

Michael Asimow, *Spreading Umbrella: Extending the APA’s Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 Admin. L. Rev. 1003 (2004).

Discussion of evidentiary hearings that fall outside the scope of the Administrative Procedure Act, which the author calls “Type B” evidentiary hearings. He refers to those presiding over these hearings as “presiding officers”. Discussing the meaning of evidentiary proceedings in the administrative context and discusses issues such as due process and procedural regulations.

Jeffrey A. Wertkin, *A Return to First Principles: Rethinking ALJ Compromises*, 22 J. Nat’l Ass’n Admin. L. Judges 365 (2002).

Reviews the legislative history of the Administrative Procedure Act and includes a discussion of the role of “hearing examiners”.

Jeffrey S. Lubbers, *Symposium on the 50th Anniversary of the APA: APA-Adjudication: Is the Quest for Uniformity Faltering*, 10 Admin. L.J. 65 (1996).

Discussion of “non-ALJ adjudicators”. Cites John Frye’s 1989 study identifying 2,692 non-ALJ adjudicators and developments since that survey. Gives number of administrative judges and hearings officers at the Boards of Contract Appeals, Department of Commerce, Department of Defense, Board of Veterans Appeals, the MSPB, the EEOC, and the Atomic and Safety Licensing Board members.

Bernard Schwartz, *The Fiftieth Anniversary of the Administrative Procedure Act: Past and Prologue: Adjudication and the Administrative Procedure Act*, 32 Tulsa L.J. 203 (1996).

Brief discussion of non-APA administrative judges. Discusses pre-APA adjudication processes and APA reforms. Offers suggestions for adjudicatory process improvements.

Charles Koch, *Administrative Presiding Officials Today*, 46 Admin. L. Rev. 271 (1994).

Discusses the results of several surveys done on ALJs and AJs. Offers proposals for those positions going forward based on the results of those studies. The AJs represented in the study were from the Board of Veterans Appeals (BVA), Equal Employment Opportunity Commission (EEOC), Merit System Protection Board (MSPB), Board of Patent Appeals/Interferences (BPA), Department of Immigration and Naturalization Services (INS), Defense Department (DISCR), Armed Services Board of Contract Appeals (ASBCA), Trademark Trial and Appeal Board (Trademark), and the Nuclear Regulatory Commission.

William Robie, *Contemporary Issues in Administrative Adjudication: Article and Commentary: A Response to Professor Verkuil*, 39 UCLA L. Rev. 1365 (1992).

Commentary in response to Professor Verkuil's article on ALJs and AJs. Discusses determinations on whether to have an ALJ or non-ALJ to make a particular type of administrative decision. Uses the Nuclear Regulatory Commission and the Special Inquiry Officers (also known as Immigration Judges) at the Department of Justice as an example of AJs with a high degree of independence. Cites the Board of Veterans Appeals as an example of AJs in non-adversarial proceedings.

Paul R. Verkuil, *Contemporary Issues in Administrative Adjudication: Article and Commentary: Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. Rev. 1341 (1992).

Overview of the two types of judges in the "hidden judiciary": ALJs and AJs. Assessment of their qualifications, how they are selected, compensation, the types of proceedings over which they preside, and their independence. References case load information from the 1989 survey conducted by the Administrative Conference of the United States (ACUS). Notes the selection and appointment of AJs is by the agency rather than the Office of Personnel Management, in the case of ALJs. Compares decisions by ALJs in the Social Security Administration (SSA) with AJs in the Department of Veterans' Affairs. Highlights the independence of AJs at the EOIR.

William R. Robie and Marvin H. Morse, *The Federal Executive Adjudicator: Alive (and) Well Outside the Administrative Procedure Act?*, 33 Fed. B. News & J. 133 (1986).

Raises questions on issues concerning non-ALJ executive branch adjudicators such as independence, selection, review of decisions, and performance appraisal. Contains a table listing full-time adjudicator positions by GS level.

Surveys

Paul R. Verkuil et al., *The Federal Administrative Judiciary*, 1992 ACUS 771 (1992).

A 368-page study commissioned by the Administrative Conference of the United States at the request of the Office of Personnel Management. The focus of the study was the selection and appointment process for ALJs, however, it also examined the current and future role of ALJs in the administrative process. Sections include historical background of ALJs and the evolution of administrative adjudications over time, the variety of administrative adjudicators, empirical study of the roles and attitudes of the federal administrative judiciary, the selection of agency adjudicators, the scope and degree of ALJ and non-ALJ independence, effects of ALJ and non-ALJ decisions, and the developing standards for when to use ALJs as presiding officers. The report includes an appendix detailing the survey findings and a bibliography of relevant books, articles, and government material.

John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 Admin. L. Rev. 261 (1992).

A 94-page article on a survey launched by the Administrative Conference “designed to identify those adjudications conducted by federal agencies that are presided over by officials who are not Administrative Law Judges (ALJs).” Agencies identified 129 types of cases, however, a substantial number of the case types were inactive, so only 83 case types were analyzed. The annual caseload was in the neighborhood of 343,200. It showed the largest category of cases arose in the Executive Office of Immigration Review (EOIR) of the Department of Justice (44%), followed by Health and Human Services (20%), the Department of Veterans Affairs (17%), the Coast Guard (6%) and the Department of Agriculture (4%). These five agencies accounted for 91% of the total caseload. Case types were divided into five general subject areas: enforcement matters (51%, mostly immigration and Coast Guard civil penalty proceedings), entitlements (37%, mostly insurance carriers in programs administered by HHS and the VA), economic (10%, mostly Farmers Home Administration), employer-employee relations (5%, mostly MSPB and EEOC), and health safety and environmental (EPA and NRC). The article goes on to specific AJ duties and case types in detail.